

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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6 In the Matter of:

7 LEHMAN BROTHERS HOLDINGS INC., Case No. 08-13555-scc

8 Debtor.

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13 United States Bankruptcy Court

14 One Bowling Green

15 New York, New York 10004-1408

16
17 March 13, 2019

18 2:06 PM

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21 B E F O R E:

22 HON. SHELLEY C. CHAPMAN

23 U.S. BANKRUPTCY JUDGE

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1 IN RE: Doc #59409 Joint Liquidators Motion for an Order
2 Enforcing the Modified Third Amended Joint Chapter 11 Plan
3 of Lehman Brothers Holdings Inc. and Its Affiliated Debtors
4 for Purposes of Distributions

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25 Transcribed by: Pamela A. Skaw

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P R O C E E D I N G S

THE COURT: Please have a seat. How are you?

Okay. We've got some folks on the phone and I'm
ready to go.

(Pause)

MR. SELIGMAN: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. SELIGMAN: David Seligman on behalf of the
Joint Liquidators from Kirkland & Ellis.

THE COURT: Yes.

MR. SELIGMAN: Here with my partner, Joe Graham.

THE COURT: Hello, Mr. Graham.

MR. SELIGMAN: Your Honor, I also just want to
take a moment to introduce one or two other people in the
courtroom.

Mr. Bruce Makai (ph) who one of the liquidators.

THE COURT: Hello. Welcome, sir.

MR. MAKAI: Thank you, Your Honor.

THE COURT: Thank you for being here.

MR. SELIGMAN: In addition, Daniel Moore,
Liquidators counsel from the UK.

THE COURT: Hello.

MR. SELIGMAN: He asked to -- going to be here in
case Your Honor has any questions or --

THE COURT: Okay.

1 MR. SELIGMAN: -- or anything of the sorts.

2 THE COURT: All right.

3 MR. SELIGMAN: Also, I -- we may have on the hone,
4 Lexa Hilliard, (indiscernible) counsel. She had a matter
5 with another judge. So, she may not --

6 THE COURT: Yes.

7 MR. SELIGMAN: She may or may not be on but she
8 had --

9 THE COURT: It -- she's listed here being on a
10 live line.

11 MR. SELIGMAN: Okay. So, she may -- she may be
12 available.

13 THE COURT: Okay.

14 MR. SELIGMAN: She had submitted one of the
15 affidavits --

16 THE COURT: Yes. I saw that.

17 MR. SELIGMAN: -- in support.

18 Your Honor, we're prepared to move forward with
19 our argument --

20 THE COURT: Yes, please.

21 MR. SELIGMAN: -- on the motion but, unless Your
22 Honor has any preliminary --

23 THE COURT: No.

24 MR. SELIGMAN: -- questions --

25 THE COURT: I've -- not surprisingly, I've -- I

1 have read everything a number of times. I'll share with you
2 that I think it's a high degree of complexity but I'm happy
3 to just hear what you have to say.

4 MR. SELIGMAN: Sure.

5 Your Honor, I wanted to -- just before I jump into
6 some --

7 THE COURT: Uh-huh.

8 MR. SELIGMAN: -- of the technicalities,
9 interpretations and documents, I just wanted to make one or
10 two observations.

11 As Your Honor is well aware in the Lehman case,
12 when the case was filed, there was obviously a whole host of
13 foreign subsidiaries of Lehman Brothers.

14 THE COURT: Right.

15 MR. SELIGMAN: They obviously -- there was --
16 there's a variety of foreign proceedings all around the
17 world.

18 THE COURT: Yes.

19 MR. SELIGMAN: I actually happen to represent the
20 Lehman RE: Bermuda Estate and separately the Lehman
21 Australia Estate.

22 But, as Your Honor is aware, there were -- in all
23 of those matters, there were either insolvency proceedings
24 commenced by directors of the foreign subsidiaries and/or
25 with the consent of Lehman, there was a whole process

1 throughout the whole case of, you know, hundreds of
2 thousands of meetings, calls, resolutions of a -- all the
3 variety of claims and fortunately most of that is behind
4 everyone. And that's a good thing.

5 THE COURT: Except for me. But that's okay.

6 (Laughter)

7 MR. SELIGMAN: Yes, Your Honor.

8 And, here, we obviously have a very different
9 situation where there were subsidiaries of Lehman that, you
10 know, shortly after the petition was filed, the directors of
11 those entities did all resign.

12 And, as Your Honor is -- you remember -- maybe you
13 recall from the substitution motion proceedings that we had,
14 there was correspondence back between the directors of those
15 -- of the UK entities to Lehman asking for direction and
16 they didn't -- they didn't get the direction.

17 Eventually, they did all resign and, then,
18 subsequently the corporate secretary of those entities
19 resigned and it led to, as we laid out in the papers, the
20 ultimate dissolution and striking from the registry and of
21 the companies -- the registry of companies in the UK of
22 these -- of the general partner for all of the relevant five
23 limited partnerships and we're obviously focused on two
24 here, who are listed in the schedules.

25 And, so, for most of the case, there was

1 effectively the entities effectively whatever -- if one was
2 to use to characterize that they did not exist. They were
3 dissolved throughout the entire term of -- or most of the
4 term of the case. Certainly, after 2010 and through the
5 entire plan confirmation process effectively. And,
6 obviously, they weren't around for many year thereafter.

7 And, so, it wasn't until 2017 when the -- when
8 these entities were replaced on the registry, pursuant to a
9 Court order in the UK and they were placed on the registry
10 for the sole purpose of the appointment of the Joint
11 Liquidators so that they could liquidate the general partner
12 and, thus, the partnerships underneath.

13 And, so, now we have the Joint Liquidators here,
14 coming in years after the effective date, faced with the
15 plan documents as they are and with the -- with, number one,
16 the belief that the plan documents, and we'll walk through
17 that just in a second, established through various orders
18 and such, that there were scheduled claims that they were
19 exempt and that there's nothing that eliminates those
20 claims. And we'll talk about -- more about that in a
21 second.

22 But, secondarily, the Liquidators, as a fiduciary
23 to their estate, you know, again, it's -- for them, it's
24 balls and strikes. Whoever -- who's ever entitled to the
25 money gets it. They're the one who actually approach LBHI

1 and said, hey, look, the schedules show that we may owe you
2 money. And, if so, that's -- that's where the cookie
3 crumbles.

4 So, I -- they don't care which way it goes. Their
5 perspective is, we're faced with these plan documents and
6 we're seeking to enforce the plan documents and to the
7 meaning of the plan documents. We're not asking for
8 exception from the plan documents.

9 Our motion is not a motion as to filing a claim.

10 THE COURT: Well, there's a difference of opinion
11 about that, right?

12 MR. SELIGMAN: There --

13 THE COURT: I mean, you are -- they are seeking to
14 enforce the plan documents as they read them.

15 MR. SELIGMAN: Yes. That is true. That is true.

16 So -- anyway. So, Your Honor, I think with that,
17 I would say that there are probably -- there are a couple --
18 there are certain things that the -- that the plan
19 administrator and the joint provisional liquidators agree
20 on.

21 There -- there's -- it's certainly -- there's
22 certainly no disagreement about the timeline in terms of the
23 resignation of the directors; the striking from the
24 registry. There's no disagreement that as of the bar date
25 that these relevant entities were on the exempt entities

1 list and that they didn't have to file proofs of claim.

2 The issue is, after the bar date when the plan is
3 proposed, confirmed and goes effective, what's the impact of
4 two relevant provisions in the plan.

5 The first one being whether they -- whether these
6 particular partnerships are a debtor controlled entities or
7 non-debtor controlled entities.

8 Our position we've laid out in the papers is we
9 believe that they are not controlled entities at the time
10 the directors had resigned. The entities had been stricken
11 from the registry. We laid out in our papers that the
12 definition of controlled versus non-controlled comes down to
13 a question of management and control and we argue --

14 THE COURT: Well, that's the -- that's the way
15 that you set it up.

16 MR. SELIGMAN: Yes.

17 THE COURT: Right? But if you look at it through
18 a different lens which is they were not being controlled or
19 not controlled -- well, let me not use the word controlled
20 since that's in your definition.

21 But there was no one else in existence, at that
22 time, who had any species of authority to act, right?

23 MR. SELIGMAN: That's correct.

24 THE COURT: So, you -- in order to prevail, we
25 look to the dictionary definition that -- or you point me to

1 the dictionary definition of manager control. But it's not
2 as if there were actually someone else who might have acted.
3 I mean, action and inaction are two halves of the same whole
4 under certain circumstances, right?

5 MR. SELIGMAN: Yes. I would agree with Your Honor
6 but I would also say that just because there was nobody else
7 who had control doesn't necessarily mean that LBHI had
8 control.

9 THE COURT: This is why people love lawyers. It's
10 great. Okay.

11 MR. SELIGMAN: Right. And we give them headaches,
12 right.

13 But I think also, Your Honor --

14 THE COURT: But then there -- but you -- I mean,
15 this is completely interesting and difficult. You did give
16 me the declaration of Ms. Hilliard.

17 MR. SELIGMAN: Yes.

18 THE COURT: And I'm not quite sure what to do
19 about that but I read it.

20 MR. SELIGMAN: Yes.

21 THE COURT: So, we're going to put to one side
22 whether I'm going to actually consider it or not. I mean,
23 it's basically an opinion on UK law, right?

24 MR. SELIGMAN: That's correct.

25 THE COURT: But the one thing that did strike me

1 in reading it was that was the explanation of the effect of
2 reconstituting, reviving, bringing back the GP and it seems
3 to say that once it's back, it's as if it was always there,
4 right?

5 MR. SELIGMAN: Yes. But -- and we're going to --
6 we get into sort of a temporal loop. No question.

7 THE COURT: Yeah.

8 MR. SELIGMAN: But, again, I think that the mere
9 fact that it had -- that there -- that you sort of -- you
10 know, a resurrection. Then you say, okay. Well, it was
11 always there doesn't -- I still don't think means
12 (indiscernible) and control because, at the end of the day,
13 what was LBHI's interests, for lack of a better of word,
14 they were a shareholder but those were wiped out.

15 I would also say that, Your Honor, that there is
16 -- one of the things laid out in the Hilliard affidavit is
17 the -- is the sort of -- there's sort of a two-step process
18 because what was stricken and then resurrected, for lack of
19 a better word, was the general partner but Ms. Hilliard also
20 laid out that, under the UK partnership statute, it's really
21 the LP is the question.

22 And, so, when the -- when the GP wasn't around, by
23 virtue of the UK partnership law, the limited partnerships
24 could not be in existence, as a separate matter, because
25 there was no general partner for those -- those period of

1 time.

2 I would also add, Your Honor, that if you want to
3 look at other indicia of the question of ownership, you
4 could also -- or control, I should say, you can also think
5 about all the other foreign insolvency proceedings or the
6 foreign -- the foreign debtors, for lack of a better phrase.

7 It's not as though they were showing up on the
8 debtor controlled entity list as a matter of fact. You
9 know, if you -- you'd probably have a bunch of foreign
10 representatives saying, no. Exactly. I'm not in control.

11 And, yet, LBHI still technically had equity or
12 still -- you know would still be ultimate equity holder of
13 those entities.

14 And, so, I think, Your Honor, to say that the UK
15 partnerships should be deemed controlled by LBHI because,
16 two levels up, there was an equity interest when you look at
17 all the other foreign entities that were out there, I think
18 that would be sort of -- that would be a -- that would be I
19 think a strange interpretation.

20 And, again, Your Honor, I think if you just sort
21 step back and appreciate what you're saying, you know, that
22 what do these words really mean when applied, but I just
23 step back to the question of management and control and just
24 sort of think about it as sort of a common sense thing.

25 It's not like LBHI was having meetings. It's not

1 like LBHI was keeping records, as far as we're aware. It's
2 not that there were annual meetings or there were reports or
3 there were anything of the sort that would be the kind of
4 indicia and control that you may have.

5 And I think, Your Honor, that even if you were to
6 take a view that the re-registration resurrection of the
7 general partnership as sort of as though it had always been,
8 that still only means, well, what was always been? An
9 equity ownership not -- that doesn't necessarily get you to
10 management and control if otherwise LBHI wasn't, in fact,
11 doing any management or doing any control.

12 So, I think, Your Honor --

13 THE COURT: But LBHI thought enough about it for
14 there to be a definition of debtor controlled entities and
15 it thought enough about it, I mean, in the context of the
16 plan and the global settlement embodied in the plan, that
17 certain of the claims that existed on the schedules that you
18 cite, attached to Mr. McCain's declaration, didn't migrate
19 to the schedule of claims of debtor controlled entities.

20 Those are different. The claims that you cite as
21 the ones that you are seeking to enforce, explore --

22 MR. SELIGMAN: Yes, yes.

23 THE COURT: -- forever, that's that schedule.

24 It's not the schedule of debtor controlled entities.

25 MR. SELIGMAN: That's correct. That's correct.

1 And I think -- again, I think that --
2 respectfully, I think that back at the time, LBHI wouldn't
3 have -- I -- it -- I don't think that they would have viewed
4 these as debtor controlled entities at the time.

5 I know --

6 THE COURT: Well, you --

7 MR. SELIGMAN: I know -- yes. I understand.

8 THE COURT: -- know it -- you know what I'm going
9 to say but I just have to say it.

10 MR. SELIGMAN: I -- but -- yes.

11 THE COURT: You, of course, can't testify. You,
12 of course, cannot know --

13 MR. SELIGMAN: Yes.

14 THE COURT: -- possibly what anybody was
15 thinking --

16 MR. SELIGMAN: Exactly.

17 THE COURT: -- at the time. So, I mean, that
18 narrative fits with, you know, your view of the meaning.

19 MR. SELIGMAN: Yes.

20 THE COURT: And I appreciate that.

21 MR. SELIGMAN: Yes.

22 THE COURT: But, you know, it's fairly miraculous
23 that given the complexity of the plan, you know, there
24 aren't, you know, dozens more issues like this.

25 This is a new one. This is a new --

1 MR. SELIGMAN: Well --

2 THE COURT: This is a new one.

3 MR. SELIGMAN: Right.

4 THE COURT: I've been doing this for five years.

5 So --

6 MR. SELIGMAN: Yes. And I think you can actually
7 take that one of two ways.

8 On the one hand, I'm sure LBHI would say, no, this
9 is clearly like not what we meant, et cetera, et cetera.

10 I would say it's actually probably a pretty good
11 thing that there hasn't been more slips through the crack.
12 That's the -- I'm not trying -- I don't want to be
13 pejorative to my adversary here.

14 But the fact that there hasn't been more is
15 actually a good thing. But it also means that when and if
16 there is one that there's (indiscernible) that we should
17 actually focus on it because maybe it slipped through
18 because, you know, there was a hole and we do need to
19 interpret it.

20 I would also just add -- and this goes back to the
21 -- you know, the -- nobody knows what was in somebody's mind
22 at the time, but I think it -- it's -- if you're going to
23 interpret any way on the interpretation of the words, for
24 the debtors to say it was a debtor controlled entity; we
25 controlled it. We management. We have -- you know, like

1 they say, with power come responsibilities.

2 So, if they really had the control, then they
3 should have the responsibility for the fact that the
4 scheduled these claims. And, if they're really taking the
5 position that, well, we scheduled them. Yes. But we did
6 that as debtor controlled so when we came out with the
7 schedule, we just -- we just wiped those claims clean with
8 nothing there.

9 You know, nowhere are they saying; hey -- and the
10 reason that they were on ultimately that the -- we actually
11 meant to eliminate them in the debtor controlled entity list
12 because we looked at it again and we didn't think they were
13 valid claims or whatever it is.

14 But they're -- I think that they kind of want to
15 have it both ways. They want to take on the mantra of
16 saying, yes. I controlled it. But, at the same time, you
17 know, they never -- those claims never ended up on that
18 debtor controlled entity list and perhaps they should have
19 and --

20 THE COURT: But you're now getting into -- I mean,
21 the general doctrines of if the Court -- if a court finds
22 the documents are clear on their face, right? Then I don't
23 get into any of that, right?

24 So, if I believe that I can read the plan
25 documents and enforce them as written, then there's one

1 result, right?

2 MR. SELIGMAN: Yes.

3 THE COURT: You say the documents mean one thing.

4 They say the documents mean another thing.

5 But -- so, unless I find that they're ambiguous,
6 then I'm not going to get into that whole process that you
7 invited me to explore; what the mean; you know, who was
8 thinking about it; whether they were on this schedule but
9 that they belong on that schedule and you have to also
10 remember, and this is an undisputed fact, that the plan
11 involved an enormous set of competencies. It was, you know,
12 a pretty miraculous thing.

13 And it has to be enforced apiece. It can't be --
14 you know, we can't like surgically go in and, you know, pick
15 out one little piece and say, oh, but -- how did you -- you
16 know, all these years later, how did you come to that
17 particular part of the settlement.

18 And, for you, that rests on the fact that there
19 are these claims related to the swaps that appeared in the
20 original schedule.

21 So, if -- so, if I were to conclude that they were
22 debtor controlled entities, is that the end of your argument
23 or do you have an alternative path?

24 MR. SELIGMAN: If they were debtor controlled
25 entities, we would not have an alternative --

1 THE COURT: Right.

2 MR. SELIGMAN: -- path.

3 THE COURT: Okay. So --

4 MR. SELIGMAN: I don't want to --

5 THE COURT: Yes.

6 MR. SELIGMAN: -- suggest that -- yeah.

7 But, again, Your Honor, I -- and I agree with Your
8 Honor that if Your Honor finds that the plain meaning of the
9 plan and relevant documents are unambiguous, I agree.
10 There's no parole evidence. There's nothing else
11 (indiscernible).

12 So, I agree with that. Although, again,
13 respectfully, we believe that -- we think that under the
14 plain terms, these entities were not controlled.

15 So -- and, obviously, the claim administrator says
16 otherwise. But I think we -- I don't think we've addressed
17 that and we've laid that out.

18 THE COURT: Okay. So, why I I hear from Mr. Fail
19 and, then, we'll see if he raises any issues that I'd like
20 to take up with you.

21 I didn't mean to cut you off. Did you have
22 more?

23 MR. SELIGMAN: Well, the only thing -- yes. The
24 only thing I --

25 THE COURT: Yeah.

1 MR. SELIGMAN: -- I just wanted to also address
2 the other argument --

3 THE COURT: Sure.

4 MR. SELIGMAN: -- that LBHI made which was they
5 said even if it was a non-controlled entity --

6 THE COURT: Right.

7 MR. SELIGMAN: -- they say, if the swaps were not
8 terminated, they were executory and, by virtue of the plan,
9 there's the deemed -- there's the -- a default rejection
10 giving rise to a rejection bar date.

11 THE COURT: Right.

12 MR. SELIGMAN: Forty-five days.

13 THE COURT: Right.

14 MR. SELIGMAN: Which there's -- for which there
15 should have been a -- for a claim.

16 Our position on that, Your Honor, is yes, if it is
17 true or we concede that if the -- if the swaps were not
18 terminated, then they would be an executory giving rise to
19 an obligation to file the rejection damages claim and if
20 Your Honor were -- so -- to so hold that, then it would be
21 our burden to decide whether we're going to seek a late
22 proof of claim. But that would be our -- that would be our
23 decision to make.

24 THE COURT: Right.

25 MR. SELIGMAN: But, Your Honor, we've asked

1 multiple times; well, were the -- were these swaps actually
2 terminated or not? Because if the swaps were terminated,
3 then --

4 THE COURT: Can I talk to you about it --

5 MR. SELIGMAN: Yes.

6 THE COURT: -- because, you know, here we are.

7 When the plan administrator did make the argument
8 essentially, you're just too late. Putting aside everything
9 else.

10 MR. SELIGMAN: Yeah.

11 THE COURT: Was that -- your clients were
12 appointed in 2017. It's been two years and it's just flat
13 out too late even if all of your arguments are correct.

14 So, there is this kind of limiting principle
15 problem that I have because the same thing that's happening
16 now could theoretically happen in two years.

17 You know, it's not a goal to think this case is
18 wrapped up in two years but a lot has to happen for that.

19 But, so, at some point, there's got to be a
20 limiting principle and something happened to provoke or
21 inspire the actions that led to this. Somebody thought
22 they found an asset, right?

23 So, then, if we were to go down that path, then we
24 would have to have an examination of well, what point was
25 the earliest point that that stakeholder could have led

1 these schedules that have -- that you provided to me and
2 said, hey, wait a minute. What happened to those swaps?

3 So, none of that happened until we got to here
4 now. And it's in 2019.

5 So, just from the standpoint of, you know, great
6 desire to treat Lehman stakeholders, you know, equally and
7 equitably, you know, I do have a concern in that regard.

8 Even if I agree with you on the meaning of debtor
9 controlled and everything that you're saying and just to
10 make clear, I'm not being critical or pejorative of, you
11 know, what has or has not been done; just observing the
12 timeline.

13 MR. SELIGMAN: Yes. Yes.

14 I would say to Your Honor that, Your Honor, I
15 appreciate what you're saying and I agree that that's in the
16 background, if you will.

17 But I would say this; if we -- we, again,
18 specifically brought this as a motion to enforce this plan
19 because we believe, respectfully, that the plan never
20 eliminated our claim and never obligated us to file these
21 particular proofs of claim.

22 And, so, that's the route we're going. Again, if
23 Your Honor finds that's not the case and that the plan did
24 require the filing of a proof of claim, then, you know, we
25 would all have to contemplate our navels and say; are we

1 going -- you know, is -- given the high bar on the 9006,
2 recognizing that, whether we're going to -- whether that's
3 the end of the matter or whether we're going to, you know,
4 bring forth our story on that issue.

5 But that's -- I submit that that's not an issue
6 for today because we're seeking to enforce the plan and I
7 think, Your Honor, although it's not directly relevant to
8 the interpretation, I think the story here of the way in
9 which -- I mean, my guess is, Your Honor, if the day after
10 the Joint Liquidators were appointed, they had to come back
11 in here on the same motion, we'd still be getting the LBHI
12 saying, you're fine. It was (indiscernible).

13 And we'd still be having the same -- there'd be
14 still the same atmospherics there regardless.

15 So, if -- you know, we don't -- we respectfully
16 believe that, you know, the plan doesn't impose this
17 requirement to file the proof of claim and that's -- and
18 that's what we're going on. We're going on the terms of the
19 plan and what they require.

20 And if Your Honor finds that there was an
21 obligation to file something and if somebody wants to ask
22 for an excuse or, you know, an exception, then that's --
23 then that's -- we'll have to deal with that.

24 I would just note, Your Honor, though that -- just
25 a final wrap up point is we talked about the issue of if the

1 swap was not rejected, not terminated, it would be
2 executory. We talked about that.

3 THE COURT: Right. Then, it's rejected under the
4 plan as of the effect date.

5 MR. SELIGMAN: It's rejected under the plan, bar
6 date 45 days thereafter.

7 THE COURT: Right.

8 MR. SELIGMAN: The LBHI interestingly has said if
9 it was not terminated, we've been asking for a long time and
10 we literally, Your Honor, attached literally every document
11 that we have in our possession to our pleadings, and you'll
12 see they're pretty bare bones. We don't even have the swap
13 which we've been asking for. We haven't gotten it.

14 And -- so, we don't know because -- whether it's
15 been terminated or not.

16 If it was terminated -- now, as a side note, the
17 schedules --

18 THE COURT: I'm sorry. I thought that you concede
19 that if they hadn't been terminated prior to the effective
20 date, it was terminated by virtue of the concurrence of the
21 event.

22 MR. SELIGMAN: It would be rejected -- it would be
23 deemed rejected on the effective date.

24 THE COURT: Right.

25 MR. SELIGMAN: But what I'm saying is if it was --

1 I'm sorry, may -- (indiscernible) if it was terminated --

2 THE COURT: Prior to the --

3 MR. SELIGMAN: -- prior to the effective date --

4 THE COURT: Uh-huh.

5 MR. SELIGMAN: -- then it was no longer executory.

6 THE COURT: Right.

7 MR. SELIGMAN: And, under the terms of the plan,
8 we come back to, again, no --

9 THE COURT: Yeah.

10 MR. SELIGMAN: -- no proof of claim -- our
11 position, no proof of claim obligation.

12 THE COURT: Right.

13 MR. SELIGMAN: We don't know. We've asked. We
14 don't know. The schedules, the amounts listed in the
15 schedules, seem to be calculated -- or, actually, it says
16 it's calculated based upon a termination date at or around
17 the petition dates.

18 So, I -- but I know --

19 THE COURT: But the -- the -- but, mind you, the
20 schedules say unliquidated.

21 MR. SELIGMAN: Right.

22 THE COURT: Okay. So, that -- the way it's listed
23 in the schedules doesn't necessarily (indiscernible) an
24 actual claim.

25 MR. SELIGMAN: Yes. And I agree. And I -- I'm

1 noting that -- I'm noting that but I have no information to
2 know whether it was terminated or not and, if it was
3 terminated, what date, as of what date. I have no
4 information on that.

5 LBHI hasn't told us but, again, that's why -- that
6 issue of whether it was terminated or not is kind of
7 important because if it was terminated prior to the
8 effective date, I believe -- our position, that takes us
9 down one route whereby you're excused from -- we had no
10 obligation to file a proof of claim.

11 If it was not terminated, now we're in rejection.
12 We're in executory contract land which there was a
13 requirement.

14 We don't know. We've asked and LBHI hasn't said
15 whether it's been terminated or not. So, that's -- that's a
16 big, you know, unknown for us.

17 Your Honor, that's, I think, our position.

18 THE COURT: Okay.

19 MR. SELIGMAN: I'm happy to address any other
20 questions or --

21 THE COURT: Thank you very much.

22 MR. SELIGMAN: Thank you.

23 (Pause)

24 MR. FAIL: Good afternoon, Your Honor.

25 THE COURT: Good afternoon, Mr. Fail.

1 MR. FAIL: Garrett Fail, for the record, from
2 Weil, Gotshal & Manges.

3 I'm joined today at counsel's table with
4 Jason Hufendick, one of my colleagues, and a representative
5 from Lehman Brothers Holdings, Inc., Mr. William Molshan
6 (ph) in the Office of the General Counsel.

7 Your Honor, there are a lot of questions that have
8 been raised, initially by the motion, by the reply, today --
9 today at the lectern including when -- were and when swaps
10 terminated; whether or not entities were debtor controlled
11 entities or non-controlled affiliates.

12 What could possibly be the amount of the claims?
13 What did different people know and when? You know, whether
14 or not this is the first of many that fall through slippery
15 hole and come back here in the next several years?

16 What I think though that I'd like to propose -- I
17 have a very, very short presentation that I think will
18 simplify and I'd like to walk through it because I could
19 hand out to the parties. (Indiscernible).

20 May I approach?

21 THE COURT: Sure. This is not evidence, right?

22 MR. FAIL: Not evidence, Your Honor. In fact,
23 (inaudible) I note that there were declarations submitted
24 but (indiscernible) as far as the plan administrator is
25 concerned --

1 THE COURT: Yeah.

2 MR. FAIL: -- it's not an evidentiary hearing.

3 THE COURT: Right.

4 MR. FAIL: We're not waiving rights. We
5 (indiscernible) contemplate cross-examination. I don't
6 think it's going to be necessary.

7 THE COURT: Right. So, how should -- so, let's
8 try to clarify what everybody thinks about that.

9 MR. FAIL: Well, Your Honor --

10 THE COURT: How should I be considering the
11 declarations that have been put in including Ms. Hilliard's
12 declaration and Mr. McCain's declaration and Mr. Brown's
13 declaration?

14 MR. FAIL: There's so many different issues, Your
15 Honor. Maybe I can simplify it and say, I don't think
16 you're going to have to address any of them.

17 To the extent that we're looking at a document, I
18 think the plan is the relevant document.

19 And if I can direct you to page two of the
20 presentation. I think this lays out --

21 THE COURT: Well, the plan and the confirmation
22 order.

23 MR. FAIL: The confirmation order, sure.
24 Certainly --

25 THE COURT: Okay.

1 MR. FAIL: -- things that are before this Court.

2 THE COURT: Okay.

3 MR. FAIL: and --

4 THE COURT: I'm sorry. Where are you telling me
5 to look?

6 MR. FAIL: On page two. It's the first page.

7 THE COURT: Oh, okay.

8 MR. FAIL: It's a chart. And I'll focus on this
9 chart. We'll walk through.

10 And the point of this chart is to say that Your
11 Honor doesn't have to answer the questions that are
12 presented. We're trying to make it easy for you because no
13 matter which answer you come on -- come to, which conclusion
14 you reach, on any one of the questions, they all lead to the
15 same place. No claim should be permitted. There are bars
16 to all of the claims that are being asserted now.

17 And, so, what I'll do is walk through, left to
18 right on the page, and you'll see that we answer each of the
19 questions posed in each alternative and we come to the same
20 conclusion.

21 And I'm happy at the end or at any point in the
22 middle --

23 THE COURT: Okay.

24 MR. FAIL: -- to answer any further questions.

25 THE COURT: Okay.

1 MR. FAIL: So, we start out; were the swaps
2 terminated prior to the effective date?

3 THE COURT: Okay.

4 MR. FAIL: So, let's start out and say no for the
5 time being.

6 And then everyone's acknowledging today that the
7 swaps were rejected on the effective date of the plan. The
8 citation for that is Section 11.1 of the plan. The text is
9 on the following page. But I don't think it's controversial
10 today.

11 So, let's continue. What's the next question?
12 Were the partnership debtor controlled entities as opposed
13 to non-controlled affiliates on the effective date of the
14 plan? That's the next question.

15 And, so, I could walk you through our arguments.
16 I think Your Honor has read them. I can answer questions.
17 I can respectfully disagree --

18 THE COURT: So, this is the box where --

19 MR. FAIL: -- with Miriam Webster.

20 THE COURT: This is the box where Mr. Seligman
21 pointed to, you know, the dozens if not hundreds or other
22 "being entities around the world" to I think make the
23 argument that this should, as a matter of fact, not be
24 considered (indiscernible) controlled entity.

25 MR. FAIL: Well, I thought he was relying

1 exclusively on Miriam Webster, Your Honor. But that
2 colloquy can't --

3 THE COURT: No. That's not the meaning of
4 control.

5 MR. FAIL: -- be relied on.

6 THE COURT: I think as opposed to --

7 MR. FAIL: Well, he was --

8 THE COURT: -- from not maybe -- I don't know if
9 the distinction was the non-controlled affiliates.

10 But let me let you keep going.

11 MR. FAIL: Well, I can pause here because I don't
12 want to leave you with any questions that are unanswered,
13 Your Honor.

14 So, there was a discussion. There was an exempt
15 entities list for the bar date purposes, for the 2009
16 general bar date.

17 There were approximately 627 entities listed on
18 that list.

19 If Mr. Seligman is saying because people resigned
20 earlier that they shouldn't have been exempt, well, then,
21 they were subject to the bar date.

22 I don't think he wants that. I think what
23 Mr. Seligman and the liquidators want is for it to have been
24 an exempt entity in 2009 and, then, for it not to be a
25 debtor controlled entity because it isn't Miriam Webster's

1 definition of -- or one of its definitions of controlled.

2 But the fact that it showed up on the exempt
3 entities list and didn't show up with a claim isn't
4 nefarious. Doesn't prove anything.

5 There were only approximately 243 entities that
6 got claims on the plan supplement. So, there's 380 that
7 didn't. This isn't a unique circumstance and no one should
8 be left with the impression that it is.

9 So, we can get into -- and I -- and I note a
10 couple of points on slide six that we covered of whether or
11 not the partnership should be debtor controlled. And I
12 really don't think you have to make a determination.

13 But, just to go over them again for the record,
14 the -- we think the partnerships were debtor controlled
15 entities until they were received -- until they were revived
16 in -- and they were revived by LBHI which is another point.

17 LBGP number one was the general partner. LBHI was
18 the sole member.

19 They allege -- they, being the joint liquidators,
20 allege that the inactions or actions of the partnerships not
21 to file the claims prior to the effective date suggesting
22 that LBHI was in control.

23 LBHI, again, as I said, was the one that put the
24 general partner into the current voluntary liquidation and
25 resolved that the liquidators be appointed in 2017.

1 We did some looking in dictionaries as well.
2 There are other definitions that are relevant here and that
3 fit within the context of the plan.

4 When you look at what a debtor controlled entity,
5 when we were writing it, and we, I mean, me, when I was
6 writing the plan, the debtor controlled entity versus the
7 non-controlled affiliates, we had in mind, we're -- you
8 know, who was actually managing it. Were there folks like
9 the Lehman RE's, Lehman Australia, LBIE, LBI, both foreign
10 and domestic folks, with other administrators that have
11 actively been appointed and actively represented across the
12 aisle.

13 Lehman Brothers Japan, Hong Kong, LBT, LBF, all of
14 the parties that entered into third party settlements were
15 the non-controlled affiliates versus the debtor controlled
16 entities. It was --

17 THE COURT: Well, I can't help you with the --

18 MR. FAIL: No. But I don't want to testify
19 either.

20 THE COURT: -- (indiscernible). Having just
21 finished testifying, you're not going to testify.

22 MR. FAIL: I'm not going to, Your Honor.

23 THE COURT: So -- okay. But we -- well, this is a
24 very helpful chart.

25 But I think one of the key points that the

1 liquidators made in pointing me to the appearance on the
2 schedules, the big schedules, right?

3 MR. FAIL: The schedules itself is as of petition
4 date --

5 THE COURT: Yes.

6 MR. FAIL: -- assets and potential liabilities.

7 THE COURT: Right.

8 MR. FAIL: Uh-huh.

9 THE COURT: Right. So, those are the claims that
10 they want to pursue.

11 MR. FAIL: One is a claim listed --

12 THE COURT: right.

13 MR. FAIL: -- on there and one is listed as an
14 asset. And they are saying, I don't know what it is. Do I
15 -- am I owed money? Pay me.

16 Or do I owe you money? Send me your mailing
17 address. Which, by the way, they're not really offering to
18 pay us. But --but one of those is listed as an asset and
19 one of them is listed as a -- as a receivable.

20 One is a receivable and one's a payable on the
21 schedules.

22 THE COURT: Well, what you're saying is that the
23 debtor controlled -- the schedule of claimed of debtor
24 controlled entities --

25 MR. FAIL: That's different.

1 THE COURT: -- trumps this.

2 MR. FAIL: Certainly.

3 THE COURT: Under the plan.

4 MR. FAIL: Under every conceivable --

5 THE COURT: It supersedes this --

6 MR. FAIL: Under -- yes.

7 THE COURT: -- under any --

8 MR. FAIL: Under everything; bankruptcy --

9 THE COURT: -- under everything?

10 MR. FAIL: -- law, bankruptcy rules, death of an
11 unliquidated claim and -- an unliquidated scheduled amount
12 that if nothing superseded, would receive nothing under the
13 Bankruptcy Code, the Bankruptcy Rules, plan.

14 THE COURT: Right. But that -- there was -- but
15 there is a schedule -- that the place to look to see whether
16 or not these claims can be pursued or allowed is the
17 schedule of claims of debtor controlled entities.

18 MR. FAIL: That's correct, Your Honor.

19 THE COURT: And that's the plan administrator's
20 position is that these claims are debtor controlled
21 entities. But your position is also that even if they are
22 not debtor controlled entities, there is no claim.

23 MR. FAIL: And let's start there. Let's -- let me
24 stop --

25 THE COURT: Okay.

1 MR. FAIL: -- arguing that it is because I think
2 our argument is stronger or as strong if it's not.

3 So, we start on the left hand side -- you know, in
4 the arguing -- or assuming arguendo, that they're not debtor
5 controlled entities.

6 Well, then, confirmation order, paragraph 37,
7 establishes a rejection bar date that's 45 days after the
8 effective date for claims.

9 So, remember, we start at the top. Were these
10 swaps terminated? We said no. Everyone agrees they're
11 rejected.

12 We go with the liquidators' argument. They are
13 not debtor controlled entities. They were on their own. We
14 didn't actively manage them.

15 Well, paragraph 37 couldn't be clearer. That
16 party had 45 days to assert a claim or forever be barred.

17 The motion says nothing in the plan stops it.
18 Nothing in the confirmation order, which I don't even think
19 they mentioned, stops them from just asserting claims.

20 THE COURT: But I think that they --

21 MR. FAIL: Very clearly, paragraph 37 does.

22 THE COURT: I think what they -- but I think what
23 they're saying is that -- they're not denying that the words
24 say that. But they're saying that by virtue of the fact
25 that the GP was gone, the LBG -- the LBHI controlled GP

1 generally was gone. There was no one around who could have
2 acted. So, essentially, oh, come on. That's not fair. You
3 can't have imposed a bar date and there being, you know, no
4 one around to have complied with it.

5 MR. FAIL: Your Honor, let's forget --

6 THE COURT: I think that's --

7 MR. FAIL: -- let's forget -- let's forget ten
8 years because I think the plan administrator took --

9 THE COURT: I mean, I'm not saying I agree with
10 that. I'm just trying to --

11 MR. FAIL: I'm saying that the plan administrator
12 took a very reasoned position.

13 We're saying, let's forget that then years have
14 passed since we first appeared here and filed the cases.

15 Let's forget that seven years have passed, last
16 week, since the plan went effective.

17 Let's forget that 16 distributions have been made
18 already. We're not counting that because, as you're saying,
19 maybe it's not their fault.

20 I disagree. Deutsche Bank is represented here in
21 the audience. Other people could have come, you know, that
22 thought to do this and revive it at the last day in the
23 statutory period to bring back -- the entities could have
24 moved sooner.

25 Let's not talk about that because that requires

1 evidence.

2 Let's look specifically though in the last two
3 years since they're here and let's consider that, for the
4 general bar date in the -- after what -- the filing of the
5 largest most complicated cases in history and the collapse
6 of the economy that's -- that ensued.

7 All parties around the world were given 400 days
8 from September 15, 2008 until the 2009 bar date to figure it
9 out and file a claim; 400 days for the world in the midst of
10 chaos and collapse.

11 The Joint Liquidators waited 550 days to appear in
12 August of 2018 to say, here's my claims. And, at that time,
13 you'll remember, Your Honor, there were more claims that
14 they were asserting against LBSF and LBHI and there were a
15 magnitudes -- you know, greater, in the billions. So, that
16 was 550 days.

17 And I think Your Honor said come back and file
18 something more appropriately. You don't get to just assert
19 -- you know, assert a claim without Court authority because
20 as Your Honor is quite aware, the confirmation order
21 establishes another bar date in paragraph 86 which says even
22 if there's nothing else, no one gets through the cracks
23 without coming through this Court and getting an order from
24 Your Honor.

25 And, so, did they -- did they come back after, you

1 know, immediately, within one day, five days, one week, one
2 month? They waited approximately 150 more days to file the
3 motion.

4 So, they filed their motion on January 22nd after
5 -- of 2019. Four distributions were made since the Joint
6 Liquidators were restored. The amount of money that went
7 out the door was \$1.777 billion dollars.

8 Claims have traded actively since they've been
9 restored and we cover all of this. There's over 1300 claims
10 that traded when we filed the reply and we did a rough count
11 for over \$8 billion in face amounts.

12 So -- so, yeah. If you were -- if they were to
13 decide -- they said they would take a beat and figure out if
14 they wanted to move forward and say; is it too late and try
15 it?

16 I don't think they're trying to assert it. I
17 think they've said repeatedly that they're -- it's a high
18 bar and we're not going to satisfy it. Give me a break.

19 But it's laid out. The first option is if it
20 wasn't terminate --

21 THE COURT: So --

22 MR. FAIL: -- then it was rejected. Then it was
23 barred. And they can try to file a late claim but they
24 didn't. So, as of today, based on the motion, that avenue
25 leads to a dead end. The claim that they put in today

1 doesn't sit; doesn't get a reserve.

2 I don't think that -- and I'm happy to answer any
3 questions along that path. But I can't see a way through
4 that or around that.

5 So, let's take another path. Were the swaps
6 terminated prior to the effective date? Let's stick with no
7 again.

8 But let's say that it is a debtor controlled
9 entity this time.

10 So, then, the rejection bar date shouldn't apply.
11 So, were they listed on the plan supplement? No. That's
12 why they're here.

13 So, even the debtor controlled entity could be
14 subject to paragraph 37 but it's also barred by paragraph 25
15 which says, if you're specifically not listed, you don't get
16 a claim.

17 So, 380 people, 380 entities, didn't get claims.
18 And, so, the language is on page four if you want to look at
19 the excerpt from the confirmation order, paragraph 25.

20 Okay. So, that's a dead end and I don't see a way
21 around it. And the plan administrator didn't see a way
22 around it.

23 But we didn't stop. We said, all right. So, what
24 if the swaps were terminated earlier? And we do both
25 scenarios again.

1 So, if they were terminated, meaning there should
2 be some liability -- I mean, and if there was liability
3 owing from LBSF because, obviously, it could have gone both
4 ways in hypothetical worlds.

5 So, if it was terminated, were they debtor
6 controlled entities? Let's start this time with yes.

7 Well, if we owed money and we didn't list it on
8 the schedule, again, paragraph 25 is the one that says
9 debtor controlled entities, if you're not listed.

10 But, even if not, Your Honor, paragraph 86 of the
11 confirmation order says you don't get to just lob in a claim
12 without coming to this Court and asking permission and
13 seeing what makes sense in the context of these cases, the
14 administration of these cases, and with what this Court has
15 done with the thousands of other claims that it disallowed
16 in 2009, and '10 and '11, '12 and so on, for being a lot
17 less late. And was there excusable neglect?

18 And there's no effort being made here. That's not
19 the motion before you. The motion before you says, can
20 these claims sit and stand and be reserved for or
21 reconciled? And the answer is no.

22 And I'm happy to answer any questions. But I
23 think, you know, we don't have to address facts or have an
24 evidentiary hearing.

25 The plan administrator's point is we don't want to

1 spend money and do discovery and have trials over things
2 that aren't right. There's no judicial economy and there's
3 no basis upon which it's burden to the debtor's estates.

4 THE COURT: Well, the question has been raised or
5 the assertion has been made that you haven't, you won't,
6 you're not interested in getting to the bottom of this
7 factually. Aren't you interested in the fact that there is
8 (indiscernible).

9 So, what should I made of all of that?

10 MR. FAIL: I think that it's --

11 THE COURT: Do they actually know the answer? I
12 mean, I --

13 MR. FAIL: I don't think we know the answer, Your
14 Honor. We haven't done the forensic level discovery to
15 answer the questions and we -- and millions of dollars and
16 countless hours have been spent fighting over, in this
17 Court, over what's a valid termination and amounts of
18 claims.

19 And we have done that. The plan administrator has
20 done that for the tens of thousands of claims that were
21 validly and timely asserted and it hasn't done it for claims
22 that aren't.

23 And, so, that's the short answer and the truthful
24 answer, Your Honor.

25 THE COURT: Uh-huh.

1 MR. FAIL: We don't -- to answer with precision,
2 and --

3 THE COURT: Well, you don't think -- let me ask
4 you. Okay. But the fiduciary, I think I'm interpreting it
5 kind of (indiscernible) fiduciary (indiscernible) we have
6 the obligation to do more than (indiscernible) you're giving
7 me your reading of the plan. And that's kind of the end.
8 That's the integrity of your position, right?

9 Not that you should go off and try to figure out
10 which way the dollars flow and then have a result oriented
11 approach.

12 MR. FAIL: Well, I think it wouldn't be --

13 THE COURT: I'm not being very articulate. What
14 they're --

15 MR. FAIL: I understand.

16 THE COURT: What they're saying is like they don't
17 really get it because how could you not be willing to go
18 down this rabbit hole if, at the bottom of the rabbit hole,
19 there might be money for the creditors?

20 And what you're saying is that you don't believe
21 that going down the rabbit hole is worth the exercise and
22 that you -- that it would be -- it's not only not required
23 by the plan but would be contrary to the plan. Not to put
24 words in your mouth.

25 You know, they're --

1 MR. FAIL: No, Your Honor.

2 THE COURT: They're --

3 MR. FAIL: It's a very fair question and we
4 considered it.

5 THE COURT: Yeah. I mean, they're --

6 MR. FAIL: The -- we don't think it's an exercise
7 of the fiduciary duty to spend, you know, resources of the
8 estate to reconcile claims that don't exist.

9 And, so, what I think that they proposed is there
10 may be this amount of money that you're owed and you may owe
11 us. And maybe it's a wash.

12 But to spend money -- spend certainly -- you have
13 to spend money with certainty to possibly achieve something.
14 I don't think you could make that judgement that -- that
15 it's worth it. But I think that's another, you know,
16 exercise of fact that we don't have to get to.

17 There are -- there are many interesting questions
18 that we could kind of pursue. But I don't think we have to
19 today and that's the plan administrator's point.

20 If -- I think -- I think we could -- I know we can
21 make arguments that it was terminated and I know that there
22 can be arguments that it -- that it was rejected. And I
23 have no basis to believe that we'll find something in the
24 middle.

25 But people litigate these things and we're really

1 winding down the claims reconciliation process. We've done
2 an amazing job of getting from 70,000 down to just a few
3 disputed claims.

4 And the invitation to allow these claims and then
5 have a dispute over termination dates and valuation is one
6 that the plan administrator declined to accept.

7 THE COURT: Thank you. All right.

8 Mr. Seligman, do you want to address the --

9 MR. SELIGMAN: Chart?

10 THE COURT: -- the chart? The --

11 MR. SELIGMAN: I -- as we were doing the chart, I
12 -- let me just hold it up.

13 I did a big "X" over everything here. Let me --

14 MR. FAIL: The whole chart.

15 MR. SELIGMAN: Not the whole chart. But
16 everything but the final right hand side because what --
17 what the plan administrator did was set up a big strawman
18 and knock down a bunch of things that we're not arguing.

19 THE COURT: Well, no. But hold on. Hold on.
20 Hold on.

21 We -- what he was trying to do was to say that you
22 raised this. You said we don't know, right?

23 MR. SELIGMAN: Yes.

24 THE COURT: And I think the point of this exercise
25 was to say, okay. But in either scenario, you get to the

1 same place which this literally is a pictorial
2 representation of getting to the same place.

3 MR. SELIGMAN: Right.

4 THE COURT: I don't think they were trying to
5 convince me that these are the facts though.

6 MR. SELIGMAN: Oh, I agree.

7 THE COURT: Okay.

8 MR. SELIGMAN: They were trying to show in all
9 circumstances we lose.

10 THE COURT: Right.

11 MR. SELIGMAN: I think -- but 90 percent of the
12 chart --

13 THE COURT: Yeah.

14 MR. SELIGMAN: -- were things that we weren't
15 arguing.

16 So, if you actually want to focus on the right
17 hand side, what -- the first question is were the swaps
18 terminated prior to the effective date?

19 If the answer is no, we've already talked about
20 that that created an obligation to file a proof of claim, 45
21 days after.

22 So, everything under that -- this no, is not what
23 we're arguing. So, let's -- we don't have to talk about
24 that.

25 THE COURT: Okay. So, let me -- so, let me just

1 -- let me just make clear.

2 MR. SELIGMAN: Yes.

3 THE COURT: If the swaps were terminated -- were
4 not terminated prior to the effective date, the no part.
5 Were the swaps terminated prior to the effective date? No.
6 Right?

7 That means --

8 MR. SELIGMAN: If they were not terminated prior
9 to the effective dates --

10 THE COURT: Right. That means they were
11 terminated by the occurrence of the effective date.

12 MR. SELIGMAN: To be -- yes. The deemed
13 rejection. Yes.

14 THE COURT: Right. And you're not taking the
15 position that -- you are agreeing that you would have had --
16 that that would be a new claim for you to be -- you --

17 MR. SELIGMAN: Yes. We conceded that.

18 THE COURT: Okay.

19 MR. SELIGMAN: We conceded that if it was -- if it
20 was not terminated, it was executory as of the effective
21 date, deemed -- facto -- default rejected, giving rise to a
22 rejection damages proof of claim obligation --

23 THE COURT: Okay. And you're not making the
24 argument that because there was no one around who could act
25 at that time to file a rejection damage claim. That's not

1 what you're arguing?

2 MR. SELIGMAN: Not for today. That -- if we were
3 to make that argument, that would be a -- you know, an
4 excusable neglect type argument. We're not making that
5 today.

6 THE COURT: Right. Okay.

7 MR. SELIGMAN: We're not --

8 THE COURT: Okay.

9 MR. SELIGMAN: We're just talking about
10 interpretation of the plan documents.

11 THE COURT: All right. So -- so, now, we're in
12 the world where the swaps were terminated prior to the
13 effective date?

14 MR. SELIGMAN: Yes.

15 THE COURT: Okay.

16 MR. SELIGMAN: Right. So, then, you get to the
17 next questions. Were the partnerships debtor controlled
18 entities?

19 THE COURT: Uh-huh.

20 MR. SELIGMAN: You've heard that debate. We
21 believe that they were not.

22 THE COURT: Uh-huh.

23 MR. SELIGMAN: So, we're under the no.

24 THE COURT: Uh-huh.

25 MR. SELIGMAN: They believe yes. We said, if Your

1 Honor were to find that they were debtor controlled
2 entities, that that would have eliminated -- that would have
3 eliminated our claim by virtue of the plan.

4 There would have been no proof of claim to file
5 because the plan would have extinguished our claim because
6 the plan says --

7 THE COURT: Uh-huh.

8 MR. SELIGMAN: -- if you're debtor controlled but
9 there's no claim on that list --

10 THE COURT: Uh-huh.

11 MR. SELIGMAN: -- you're out.

12 THE COURT: Right. So --

13 MR. SELIGMAN: So, that's another thing we are not
14 arguing.

15 THE COURT: Okay. So, we are literally only
16 looking at the yes/no branch. And you say that if the swaps
17 were terminated prior to the effective date and the
18 partnerships were not debtor controlled entities on the
19 effective date, you win.

20 MR. SELIGMAN: We win because what they're arguing
21 in paragraph 86 is there's -- that -- let me turn to that.

22 (Pause)

23 MR. SELIGMAN: Paragraph 86 --

24 THE COURT: Eighty-six says after the effective
25 date of event of proof of claim relating to an executory

1 contract that was rejected, blah, blah, blah proof of claim
2 relating to a pre-petition claim may not be filed or amended
3 without the authority of the Court.

4 MR. SELIGMAN: Right. And what we're saying is we
5 were exempt from having to file a proof of claim.

6 This, paragraph 86, presupposes that we had an
7 obligation to file a proof of claim.

8 And what we're saying is we were an exempt entity.

9 MR. FAIL: No.

10 MR. SELIGMAN: There is nothing in the plan that
11 overrules the -- the fact that we were an exempt entity and
12 excused from having to file a proof of claim and, again, 86
13 -- 86, Your Honor, is a standard boilerplate provision,
14 okay, that says that if you're going to file a late -- if
15 you're going to file a late claim or you're going to amend a
16 claim, it's --

17 THE COURT: Right. But you want to be an exempt
18 entity.

19 MR. SELIGMAN: Yes.

20 THE COURT: Without being a debtor controlled
21 entity.

22 MR. SELIGMAN: Exactly. And we have said that --
23 Your Honor, that is the unicorn of this case. This is a
24 situation where we are saying we were an exempt entity at
25 the time of the bar dates, okay?

1 We were also a non-controlled entity because of
2 the dissolution and the only thing that would have strike --
3 struck us out is either the fact that we were a debtor
4 controlled entity, which (indiscernible) plan but we're
5 saying we're not -- we were not controlled and if the -- and
6 that if the claim was -- if the -- the swap was still
7 executory.

8 And that's why, Your Honor, it's a key issue about
9 whether this thing was (indiscernible) or not and that's
10 what we've been telling LBHI is, look. If you --

11 THE COURT: But you can't -- but you can't -- you
12 want me to only look at the far right of the chart but you
13 were not -- I --

14 MR. SELIGMAN: I agree.

15 THE COURT: I have to decide this -- we don't
16 know, right?

17 MR. SELIGMAN: We don't know and that's what we've
18 been asking and they haven't taken a position on it.

19 And, so, our position --

20 THE COURT: Right. But you're --

21 MR. SELIGMAN: -- but I --

22 THE COURT: -- you're encouraging me to go down
23 the yes for answer this because it leads you to an argument
24 that you're telling me you can win.

25 MR. SELIGMAN: Well, but I would put it this way.

1 It's their defense. We say if you look at the plain terms
2 of the plan --

3 THE COURT: Uh-huh.

4 MR. SELIGMAN: -- there's nothing in the plan that
5 eliminates -- that required us to file a proof of claim.

6 It's the debtors who are saying, hey. I got an
7 affirmative defense. This may have been not terminated.
8 Sorry for the double negatives.

9 This may have been an existence, still executory,
10 on the effective date. And, if it was, you had had a bar
11 date that you had to comply with.

12 And, so, it's -- it's them who's saying -- I --
13 they're -- I -- it's them who's raising this issue as a
14 defense, as an affirmative defense.

15 So, we believe, Your Honor, that, again, if you
16 sort of go on the timeline, we were an exempt entity. There
17 was nothing requiring us to file a proof of claim. We were
18 not -- we were --

19 THE COURT: Well, who's the -- when you say we
20 were an exempt entity; who's the we? Which exact entity was
21 the exempt entity?

22 MR. SELIGMAN: Two limited partnerships, I call
23 them -- we call them LP4 and LP5.

24 THE COURT: Right.

25 MR. SELIGMAN: Those were the creditors, were the

1 two exempt entities listed on the exempt entities schedule.

2 THE COURT: The --

3 MR. SELIGMAN: And then not listed --

4 THE COURT: But they're not asking to file a claim
5 now.

6 MR. SELIGMAN: We're not asking to file a claim
7 because we believe we still have claims because there's
8 nothing in the plan that --

9 THE COURT: Well what would be the name on the
10 proof of claim that would get filed if I said you could file
11 a proof of claim?

12 MR. SELIGMAN: We have -- there's -- there is the
13 scheduled claims which are still ex-stance because there's
14 been nothing to overrule or overwrite the scheduled claims.
15 And, by virtue of those --

16 THE COURT: Okay. But you -- you're telling me
17 you still have claims by virtue of scheduled unliquidated
18 (indiscernible) --

19 MR. SELIGMAN: Right. But we're -- or another way
20 to think about it, Your Honor, is we were exempt from having
21 to file a proof of claim.

22 THE COURT: Who's the we?

23 MR. SELIGMAN: LP4 and LP5.

24 THE COURT: But LP4 and LP5 were still in
25 existence.

1 MR. SELIGMAN: They were -- under the bar date,
2 they were exempt entities.

3 So, that's step one. By virtue of being an exempt
4 entity, they did not have to file a proof of claim.

5 Fast forward about a year and a half, there's the
6 plan. The -- and we're saying there's nothing in the plan
7 to override the fact that LP4 and LP5 were exempt entities.

8 It's the plan administrator, LBHI, who's saying,
9 wait a second. LP4 and LP5 were debtor controlled entities
10 and, on the schedule of debtor controlled entities, because
11 they were not listed, the claims extinct.

12 THE COURT: Yeah.

13 MR. SELIGMAN: And we're saying, respectively, we
14 were not controlled entities.

15 And, by the way, Your Honor, the definition in the
16 plan of whether it's a controlled entity or not is
17 management and control. I just want to emphasize,
18 obviously, under plain statutory contract interpretation,
19 you've got to give meaning to both words, right?

20 So, it's both controlled and managed.

21 THE COURT: But I -- but now we're back -- now
22 we've --

23 MR. SELIGMAN: Now we're back --

24 THE COURT: Now we've come full circle and LBHI's
25 position, right now, is that action -- it was their choice

1 -- action or inaction was their choice to make.

2 MR. SELIGMAN: Their choice? Which choice?

3 THE COURT: They -- the GP dissolved and therefore
4 no claims were filed. And that was -- their means of
5 managing or controlling was by not acting.

6 MR. SELIGMAN: I would say, Your Honor, that --

7 THE COURT: Well, but that's -- I mean, but, in
8 other words, you're not alleging -- there's no allegation
9 here that there was some sort of a breach of fiduciary duty.
10 I mean, they -- that they were in the position of having the
11 ability to act; having the ability to manage and control.
12 And they discharged that responsibility by going away.
13 That's --

14 MR. SELIGMAN: I --

15 THE COURT: That's what they did.

16 MR. SELIGMAN: Right. But I would say, Your Honor,
17 think about it like when a debtor comes to Your Honor and
18 seeks a motion to abandon an asset, okay?

19 THE COURT: Yeah.

20 MR. SELIGMAN: You have the -- the debtor has the
21 fiduciary duty to decide whether to abandon an asset or not.
22 They abandon it. It's not part of the estate.

23 I don't think anybody would say, well, the
24 trustee, by virtue of abandoning it on one day, it's -- it
25 still has a fiduciary -- it still has control or management

1 post-abandonment, which is effectively what happened here
2 because --

3 THE COURT: Well, but now you're -- you -- it
4 sounds like you -- you know, now we get into this very brain
5 twisty world of the fact that, you know, you basically you
6 had a cup of coffee and it became a -- you know, a freeze
7 dried powered coffee and then a number of years later,
8 somebody adds hot water back into it and you got coffee
9 again. And --

10 MR. SELIGMAN: But I would say, Your Honor, I --
11 I'm sorry. I didn't mean to interrupt you.

12 THE COURT: Yeah.

13 MR. SELIGMAN: I apologize.

14 I would say, Your Honor, that even -- you know,
15 manage and control. The mere fact that somebody has a
16 passive equity interest, okay, I don't think even what gives
17 rise to management and control when you think about
18 management and control; having meetings; having a board;
19 taking minutes --

20 THE COURT: Oh, I don't -- I don't think you want
21 to go down that path.

22 MR. SELIGMAN: But -- well, but I would say --

23 THE COURT: So --

24 MR. SELIGMAN: But, I would say, in addition, once
25 the dissolution happens -- I mean, these things were

1 dissolved and stricken from the registry --

2 THE COURT: Okay.

3 MR. SELIGMAN: -- and when I say these things, it
4 was the general partner that was stricken from the registry.

5 THE COURT: Yes. But somebody, all these years
6 later, decided, oh, look. That thing there might have
7 value. So, I'm going to add the hot water back into the
8 powdered coffee --

9 MR. SELIGMAN: Right.

10 THE COURT: -- and we're going to have a cup of
11 coffee again.

12 And it's very -- it's very problematic to me,
13 apart from the words of the plan, it's very problematic to
14 me to go down a path where there is literally not limiting
15 principle.

16 Somebody could come back, five years from now,
17 when the case is closed. Mr. Fail, did you hear that?

18 MR. FAIL: I'm waiting.

19 THE COURT: That five years from now --

20 MR. FAIL: I'm waiting. I'm ready.

21 THE COURT: -- when the case is closed --

22 MR. FAIL: Five.

23 THE COURT: Way before then, please, if you will.

24 Say motion to reopen, we found these claims, you
25 know, let us in.

1 And if there's three cents left or there's three
2 millions cents left of whatever, and there -- there
3 literally is not limiting principle.

4 But here's the limiting principle that when people
5 are in the sentient beings in the world and in the world of
6 Lehman and they could have acted earlier, by gosh, they
7 should have acted earlier.

8 So, I fully understand that your clients now have
9 a responsibility and are seeking direction by this motion
10 from the Court. I totally get that. Completely fair.
11 Don't have a problem with it at all.

12 Obviously, I think you can tell, that this is
13 going to --

14 MR. SELIGMAN: There are reservations.

15 THE COURT: This is very difficult. Yes. This is
16 very difficult. This is just very difficult.

17 Some of you have been here before and may have
18 gotten used to me giving you a decision from where I'm
19 sitting. That's not going to happen today.

20 I'm going to have to take this under advisement.

21 MR. SELIGMAN: I --

22 THE COURT: And to that point, therefore, I'm --
23 and I don't even know that you specifically asked for a
24 reserve but I am not prepared to apply (indiscernible) the
25 next distribution date which I think may be in April. In

1 April?

2 MR. SELIGMAN: Correct.

3 THE COURT: Okay.

4 MR. SELIGMAN: Early -- yes. Your --

5 THE COURT: Yeah.

6 MR. SELIGMAN: Your Honor, I would say a couple
7 things.

8 As somebody who is 90 percent of the time
9 representing debtors --

10 THE COURT: I've heard of your firm doing that.

11 MR. SELIGMAN: Yes. It's like -- it's like my
12 colleagues -- I went to Dartmouth and Daniel Webster sitting
13 in the Supreme Court was, it's a small college but there are
14 those who love it.

15 So, we're a small firm and we do our Chapter 11s.
16 But I appreciate Your Honor is -- is struggling with the
17 limiting principle. And I -- and we were very careful with
18 bringing this motion because we understand that coming in --
19 coming in two months after a bar date is, you know, gains
20 skepticism let alone coming in, you know, seven, eight
21 years.

22 So, we were -- we were, for lack of a better word,
23 judicious in the way that we approached this.

24 And I think that what we would say is limiting
25 principle and why this is not a Pandora's box is because we

1 are saying, Your Honor, enforce the plan as is, with these
2 circumstances.

3 We are not coming in here and saying like, oh,
4 Lehman's bad guys and they weren't around --

5 THE COURT: Well --

6 MR. SELIGMAN: -- and, therefore, we should be
7 excused. We're not asking from --

8 THE COURT: Okay.

9 MR. SELIGMAN: -- excuse --

10 THE COURT: I got it.

11 MR. SELIGMAN: -- from any --

12 THE COURT: I get it.

13 MR. SELIGMAN: -- of the provisions of the plan.
14 We're wrapping ourselves in the plan.

15 THE COURT: I get it. Well, that's --

16 MR. SELIGMAN: And then we're going to live and die
17 by what the plan says.

18 THE COURT: And that's my task and I'm going to
19 figure it out.

20 So, Mr. Fail, last words?

21 MR. FAIL: Thanks, Your Honor.

22 Just very briefly. The analysis that was just
23 gone through is just not right and it's not what -- it's not
24 the analysis that we made and -- just very briefly.

25 THE COURT: Okay. Then, let's go again.

1 MR. FAIL: The right hand column doesn't mean that
2 there's no -- it's just simply not true or accurate to state
3 that nothing prevents a claim from being asserted now. That
4 there's nothing in the plan or confirmation order. There
5 is. It's paragraph 86.

6 If it -- so, they're saying, and Your Honor was
7 right, we don't know. Was it terminated early or rejected?
8 They want to put in a claim and then have a legal debate and
9 fact discovery and a trial over that. Just to get in the
10 door. I guess you have to do that because you -- we don't
11 know right now.

12 But let's just put that aside and pretend that we
13 know, right now, that the swaps were terminated early.

14 Their position is because they were a debtor
15 controlled entity or they weren't. They're saying they
16 weren't.

17 We go down that route. There is a bar. It is a
18 new bar date.

19 THE COURT: But the answer to that was --

20 MR. FAIL: And it is not -- and it not high to
21 the bar date.

22 THE COURT: But --

23 MR. FAIL: He's saying it is and that's just not
24 true.

25 THE COURT: But what Mr. Seligman said was that

1 that language that I read, the paragraph 86 language, is
2 inapplicable because they were exempt entities.

3 MR. FAIL: You can't -- where is you -- where is
4 the basis in the confirmation order or the plan that ties
5 it? It doesn't. It is a brand new stand alone bar date.
6 Where --

7 THE COURT: Okay.

8 MR. FAIL: -- does it say that?

9 THE COURT: Okay. Pause for -- pause for a
10 second.

11 Mr. Seligman, why is he wrong?

12 MR. FAIL: There are things that cross over
13 between the plans. This is not one of them. It is a stand
14 alone new bar date.

15 THE COURT: Okay. Let's stick with this very
16 narrow point.

17 MR. SELIGMAN: I come back that we were an exempt
18 entity.

19 THE COURT: Okay. Okay.

20 MR. SELIGMAN: And --

21 THE COURT: So, stop. So --

22 MR. SELIGMAN: -- that has -- that has meaning.

23 THE COURT: So, Mr. Fail, Mr. Seligman's answer to
24 your argument is, no, no. They were an exempt entity.

25 MR. FAIL: That excuses -- that says the 2009 bar

1 date doesn't apply. And between 2009, Your Honor, and 2001
2 confirmation, years passed, claims were filed and
3 recognized.

4 THE COURT: So, you are saying old bar date. Fair
5 enough. New bar date --

6 MR. FAIL: We -- we assumed that. Yeah.

7 THE COURT: -- in the plan doesn't happen. That's
8 your position.

9 MR. FAIL: It doesn't. Your Honor has enforced it
10 time and again.

11 THE COURT: Got it. Okay. Thank you.

12 MR. FAIL: There is no link whatsoever. That's
13 why -- and that's why when Mr. Seligman and the liquidators
14 say, they won't try to meet the high bar and there's
15 skepticism if it was two months late, the same analysis
16 under paragraph 86 should apply.

17 It is a new bar date. It is very late. And
18 that's why we're not answering any more questions and I
19 won't take your time, Your Honor.

20 THE COURT: All right. Let's leave it there.

21 Mr. Graham, was there something that you had
22 wanted to say?

23 MR. GRAHAM: No. Your Honor, I just -- if we're
24 in a world and there was a lot of talk about whether we were
25 a controlled or not a controlled entity, we have two claims

1 that are not listed on the schedule of debtor controlled
2 entities, subordinating notes claims that are being treated
3 as allowed and they were scheduled like four days before
4 confirmation.

5 And it just seems very odd that they would have
6 scheduled claims for the subordinating notes that the LP4
7 and LP5 have if their position was that -- and they didn't
8 put them on the debtor controlled schedule, if their
9 position was that we were a debtor controlled entity.

10 And it just seems like a very odd -- there -- it
11 seems --

12 MR. FAIL: Or does it suggest that we were able to
13 control it and schedule it. I mean, so, you --

14 THE COURT: Hold -- hold on. We're
15 (indiscernible).

16 MR. FAIL: (Indiscernible) --

17 MR. GRAHAM: (Indiscernible) --

18 THE COURT: Hold on. We've now just -- we've not
19 just spun way out of control. I mean, in violation of my
20 own rule against two people arguing the same thing to me,
21 let me speak, Mr. Graham.

22 I thought you wanted to say something but what you
23 did was open a whole pathway that was not addressed in the
24 pleadings and, again, gets us into -- I don't think that
25 that point was (indiscernible) --

1 MR. GRAHAM: It was made in paragraph seven of our
2 reply, Your Honor.

3 MR. SELIGMAN: Your Honor, I did mention it. We
4 don't need to argue it. It's just paragraph seven.

5 THE COURT: Okay. I will take a look at paragraph
6 seven. If -- it sounds to me like it invites me back into
7 the world of thought processes and (indiscernible). But I
8 will take a look at it. It's paragraph seven in your --

9 MR. SELIGMAN: In our reply, Your Honor.

10 THE COURT: -- in the reply.

11 MR. FAIL: So, we didn't get a chance to address
12 it because we didn't do a surreply, Your Honor.

13 I don't think you have to get into it because
14 there's no -- what they argue, that they don't want the
15 subordinated claim they were getting. Obviously, not, Your
16 Honor.

17 But the subordinated debt claims against LBHI were
18 treated by different sections of the plan. There are
19 multiple -- look at the disclosure statement, Exhibit 10,
20 has lists -- there's multiple classes of sub-debt that we
21 allocated to different levels of senior creditors depending
22 if they were derivative or not. Dead or not. Guarantee or
23 not.

24 It was a complicated exercise to do a global
25 settlement. Sub-debt, that they held was publicly traded

1 sub-debt.

2 If -- there are multiple provisions of the plan.
3 We didn't address it because we didn't have a chance to and
4 it's not relevant.

5 But to suggest that because they were given claims
6 means they were not controlled, that -- that's just a itsy
7 ditsit (ph) and doesn't -- there's no fact basis for it.
8 And there's no reason to go down another factual rabbit hole
9 to figure out why that was or when.

10 The simple question is; under any course, we're
11 talking about the swaps claims. That's all they've asked to
12 file. Once upon a time, they were here asserting billions
13 of dollars of claims. Today, they seem to want 28 million
14 up to whatever million, Your Honor.

15 It's not before the Court. Raised in a reply or
16 otherwise.

17 THE COURT: All right. Very good. As I said,
18 you've given me a lot to think about. I have not made a
19 decision yet.

20 I will issue a decision in due course.

21 Thank you very much for coming in today.

22 MR. FAIL: Thank you, Your Honor.

23 MR. SELIGMAN: Thank you --

24 (Audio ended in mid-sentence)

25 (Whereupon, these proceedings were concluded at 3:16

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C E R T I F I C A T I O N

I, Pamela A. Skaw, certifies that the foregoing transcript
is a true and accurate record of the proceedings.

Pamela Skaw

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[& - apologize]

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